

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-1085

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

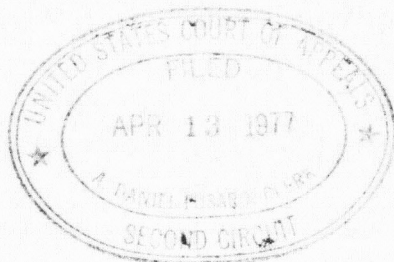
-against-

JUAN ANTONIO ALVAREZ, et al.,
Defendants-Appellants.

*On Appeal From a Judgment of the United States District
Court for the Southern District of New York.*

**APPENDIX FOR TOMMY DAVIS
DEFENDANT-APPELLANT**

NICHOLAS FIGUEROA
*Attorney for Tommy Davis,
Defendant-Appellant*
277 Broadway
New York, New York 10007
(212) 962-4280



10641

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DOCKET ENTRIES

(pp. 1a-5a)

CP. 1-21-77

OFFENSE PO ☐ JUDGE ~~XXXXXX~~ Assigned ☐ U.S.
 OFFENSE MO ☐ 0862 vs
 ANDOR MIE ☐ Disposition
 ELONY Fel ☒ 0208 1 District Office

DAVIS, TOMMY a/k/a "Bipty"

(LAST, FIRST, MIDDLE)

Case Filed
Mo. Day
04 05
No. of Dets
*33

76 0324 20

U.S. MAG. CASE NO. 76-510

BAIL - RELEASE

☐ Denied ☐ AMT ☐ Fugitive
☐ Set ☐ 1st Pmt. (w/dep)
☐ PHA
 \$ 000 ☐ 10% Deposit
☐ Collateral
☐ Bail Not Made
☐ Status Changed (See Docket) ☐ 3rd Pmt Cust. Other

U.S. TITLE/SECTION

21:846

21:812, 841

OFFENSES CHARGED

Consp. to viol. Narco. Laws.

Distr. & possess. of Cocaine II

ORIGINAL COUNTS

1
28, 29

SUPERSEDING COUNTS

II. KEY DATES & INTERVALS

ARREST or

U.S. Custody Beg. in

4/21/76

Summons Served

First Appearance

INDICTMENT

High Risk Date

Information 4-5-76

Indict. Waived

Superseding

Indict/info

In Charging District

ARRAIGNMENT

Trial Set For

1st Plea

4-29-76

Final Plea

TRIAL

Voir Dire

Trial Began

8-10-76

Trial Ended

11-12-76

SENTENCE

Disposition of Charges

11-12-76

1-21-77

☐ Convicted☐ Acquitted☐ Dismissed☐ On Government's Motion☐ On All Charges☐ On Lesser Offense(s)☐ WOP☐ WOP

MAGISTRATE

DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME
Search Warrant	Issued	PRELIMINARY EXAMINATION	Date Scheduled	☐ DISMISSED HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
Summons	Issued	OR	Date Held	
Arrest Warrant Issued	Served	REMOVAL HEARING	Waived	☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW
COMPLAINT		NOT WAIVED	Tape Number	
OFFENSE (in Complaint)		INTERVENING INDICTMENT		

U.S. Attorney or Asst.

ATTORNEYS

Defense ☒ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CO

Daniel J. Beller
791-1992

207

Gilbert-Epstein, 100 Church St., NYC-10017-
962-1564- Nicolas Figueras - 7-5-76 Subs.

* Show last names and suffix numbers of other defendants on same indictment/information.

Alvarez, et al.

DATE

(DOCUMENT NO.)

PROCEEDINGS

EXCLUDABLE DAY
(a) (b) (c) (d)

4-5-76

Indictment filed.

Lasker, J.

Indictment ordered sealed.

Lasker, J.

4-20-76

Indictment ordered unsealed. B/W ordered. B/W issued.

Brieant, J.

Indictment ordered resealed.

Brieant, J.

4-21-76

Indictment ordered unsealed.

4-29-76

Deft. (Atty. present) enters plea of not guilty. Case assigned to Judge
Owen. Atty. directed to report to chambers immediately. MacMahon, J.

5-4-76

Filed Dfts. Notice of Motion for an order directing certain discovery, etc. &
requiring Gov't to produce & deliver all evidence to dft. as indicated, &
granting bill of particulars, & further relief. Ret. 504-76.

5-5-76

Filed the following papers rec'd from Mag. Bernikow. (Mag. #76-510)

Docket Entry Sheet

Criminal Complaint

Disposition Sheet

Financial Affidvt.

Warrant of Arrest - executed 4/21/76.

CJA Form 20 Copy 5 - Appointing Gilbert Epstein, 100 Church St., NYC 10017
as dft. atty. & Notice of Appearance by Atty.

OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW IN SECTION V ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

DATE	IV. PROCEEDINGS (continued)	PAGE TWO				V. EXCLUDABLE DELAY				LE
		Interval (a)	Start Date (b)	End Date (c)	Total (d)	Interval (a)	Start Date (b)	End Date (c)	Total (d)	
-21-76	Filed Dfts. Notice of Motion to sever. Ret. 6/1/76 @ 10:00 a.m.									
5-24-76	Filed Dfts. Notice of Motion to Suppress Evidence. Ret. 6/1/76.									
-76	All Motions Rtn. Today Jun 1st Are Adjourned to Jun 4th @ 2:00P.M.									
3-76	Filed transcript of record of proceedings, dated 4-29-76 - 10:30 A.M.									
-15-76	Filed Bvlt's. Bill of Particulars.									
6-16-76	Filed Opinion #44578. The Gov'ts Memorandum of law 17 Matters with prepared to accede as to each dft. as indicated. The Gov't concession is made the order of this court & the Gov't is to forthwith comply therewith.....Owen J. (mailed notice)									
-18-76	Filed Order that each dft. represented by counsel who is appointed under Criminal Justice Act is authorized to retain investigation services & expend up to the statutory limit of \$300.00 & dfts. may at their option retain the named investigator & apply their authorized moneys severally to his fee as allowed by this Court...Owen J. (mailed notice)									
06-24-76	Filed Deft's. affidavit & notice of motion for suppression of evidence.									
6-30-76	Filed order that all voir dire Questions are to be submitted by 7-14-76 OWEN.J. m/n/.									
6-29-76	Filed Opinion #44673..Deft's John Cepre, Steven Dellacava and Leoluca Guarino, are collectively sever for a later trial. Beyond the foregoing, all motions to sever ar denied.OWEN.J.m/n/.									
6-21-76	Suppression Held.....Owen J.									
7-5-76	Dft. Tommy Davis - Appointment of New Counsel - Gilbert Epstein is substituted by Nicolas Figueroa.....Owen J.									
7-7-76	Filed Memorandum & order. It is ordered in the interests of justice, that the trial of this action is adjourned from 7-19-76 to 8/10/76, to begin at 10:00 a.m. in Courtroom 318Owen J. (mailed notice)									
7-9-76	Filed Memorandum Order Trial has been adjourned to 8-10-76, proposed voir dire questions due 8-3-76 directly to Chambers.Owen J. (mailed notice)									
15-76	Filed Opinion #44760. All Motions of Dfts. as moved for discovery & Inspection & bill of particulars, are denied. Certain Dfts. moved for psychiatric information as indicated. The Foregoing is so Ordered....Owen J. (mailed notice)									

FINE AND RESTITUTION PAYMENTS

Cont'd/

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

DATE	PROCEEDINGS
-20-76	Filed transcript of record of proceedings, dated 5-6-76
-20-76	Filed transcript of record of proceedings, dated 5-7-76
-76	Filed transcript of record of proceedings, dated 5-20-76
-20-76	Filed transcript of record of proceedings, dated 5-10-76
7-16-75	Filed Opinion #44768. All motions seeking disclosure of Gov't witnesses are denied. Dfts. motions to disclose identity of cooperating dfts. denied. Various Dfts. move to dismiss indictment on grounds of preindictment delay, motions denied. Movants seeking order enjoining Gov't from cross examining them about past record, any movant seeking this issue, hearing will be held on 7/21/76 in Room 318. All other motions denied as indicated. Owen J. (mailed notice)
7-20-76	Filed Opinion #44769. Gov't order to deliver in camera inspection as indicated. Owen J. (mailed notice)
-22-76	Filed Memo. End on Dfts. Motion to Suppress, Motion Denied. See Minutes. Owen J. (mailed notice)
7-22-76	Filed Memo. End, on Dfts. Motion to Suppress dtd. 6-24-76. Motion Denied. See Minutes. Owen J. (mailed notice)
-9-76	All Counsel present for P.T.C.
8-10-76	Trial begun - Interpreters Gustavo Hoffman & Anita Zevallos sworn. Jury Selection begun.
8-11-76	Jury Selection Cont'd
8-12-76	Jury Selection Cont'd - Suppression Cont'd & Concluded.
8-17-76	Filed CJA 20 Copy 2 - approving payment to Gilbert Epstein, 100 Church St., NYC 10007 as dfts. Atty.
8-31-76	Filed transcript of record of proceedings, dated 7-31-76
8-18-76	Trial Cont'd - Openings Cont'd
8-19-76	Trial Cont'd
8-20-76	Trial Cont'd
8-23-76	Trial Cont'd
8-24-76	Trial Cont'd
8-25-76	Trial Cont'd
8-26-76	Trial Cont'd
8-27-76	Trial Cont'd
8-30-76	Trial Cont'd
8-31-76	Trial Cont'd
9-1-76	Trial Cont'd
9-2-76	Trial Cont'd
9-3-76	Trial Cont'd
9-7-76	Trial Cont'd - Hearing Held concerning Authority of Tape 3505-05 of concerning dft. intersome court finding: Tapes are Original Unaltered Version. Owen J.
9-8-76	Trial Cont'd
9-9-76	Trial Cont'd
9-10-76	Trial Cont'd
9-13-76	Trial Cont'd

(Cont'd)

DATE	PROCEEDINGS
9-14-76	Filed Order that each counsel who is appointed under the Criminal Justice Act, is authorized to file an interim voucher for services rendered under the Criminal Justice Act from the date of their appointment up to & including 9/10/76. the actual trial having commenced on 8/10/76 & continuing & the assigned counsel may file a final voucher subsequent to the termination of trial as to their respective dfts. subject to the ultimate allowance of this court.....Owen J. (mm)
9-14-76	Trial Adj. to 9-15-76.
9-15-76	Trial Cont'd
9-16-76	Trial Cont'd
9-17-76	Trial Cont'd
9-20-76	Trial Cont'd Jurer #10 is excused & replaced by Alt. #1.
9-21-76	Trial Cont'd
9-22-76	Trial Cont'd
9-23-76	Filed True Copy of USCA Mandate. District Court Order is Affirmed. Judgment Ent. 9-24-76 Clerk, Ent. 10-1-76. (mm)
10-8-76	Filed Gov'ts Application for an order of Immunity as to Peter J. Fiumara, witness.
10-8-76	Filed Order that Peter J. Fiumara give testimony & that any testimony etc. shall be subject to immunity provisions as indicated. This Order shall not take effect until Peter J. Fiumara refuses to testify as indicated....Owen J. (mm)
9-23-76	Trial Cont'd
9-24-76	Trial Cont'd
9-27-76	Trial Cont'd
9-28-76	Trial Cont'd
9-29-76	Trial Cont'd
9-30-76	Trial Cont'd
10-1-76	Trial Cont'd
10-4-76	Trial Adj.
10-5-76	Trial Cont'd
10-6-76	Trial Cont'd
10-7-76	Trial Cont'd
10-8-76	Trial Cont'd
10-12-76	Trial Cont'd - Gov't Rests - Motions
10-13-76	Trial Cont'd - Motions Cont'd
10-14-76	Trial Cont'd
10-15-76	Trial Cont'd
10-18-76	" "
10-19-76	" "
10-20-76	Trial Adj. to 10-21-76
10-21-76	Trial Cont'd - Govt Summation begun....Owen J.
10-22-76	Summation Cont'd
10-25-76	" "
10-26-76	" "
10-27-76	" "
10-28-76	" "
10-29-76	" "
11-1-76	" "
11-2-76	" "
11-3-76	" " & Concluded - Govts Rebuttal begun.
11-4-76	Gov't Rebuttal Cont'd
11-9-76	Filed CJA Copy 2 Approving payment to Nicholas Figueroa, 277 Bway, NYC 10007 as counsel for dft.....dtd..9-27-76.....Owen J.

PROCEEDINGS

Date Order
Judgment No.

76	FILED	PROCEEDINGS	Date Order Judgment No.
76		Filed One Sealed Envelope - dtd. 10-6-76 - Ordered Sealed by the Court on this date.....Owen J.	
2-76		Filed One Envelope Sealed- dtd. 8-30-76 - Ordered Sealed by the Court on this date.....Owen J.	
2-76		Filed One Sealed Envelope - dtd. 11-4-76. Notes from Deliberating Jury. Ordered Sealed by the Court this date.....Owen J.	
2-76		Filed One Sealed Envelope - dtd. 8-13-76. Questions subm. to Court by counsel in jury selection...Ordered Sealed by the Court.....Owen J.	
2-76		Filed One Sealed Envelope - dtd. 11-15-76...Ordered Sealed by the Court 10-6-76Owen J.	
2-76		F.S.I. Ordered for each dft. - Verdict - Sentencing date for all dfts. - Jan. 10, 1976 from 10:00 A.M. on - Dft. Ct. 1- Guilty, Ct. 22- Guilty, Ct. 23 - Guilty, Bail R.O.R. Cont'd.....Owen J.	
7-76		Trial Cont'd - Charge to Jury.	
7-76		Charge Cont'd & Deliberations Begun.	
7-76		Deliberations Cont'd	
8-76		" "	
9-76		" "	
10-76		" "	
11-76		" "	
12-76		" & Concluded.	
1-77		Filed Redacted Indictment.	
7-76		Filed transcript of record of proceedings, dated Jun. 1, 21, 24 & Jul. 1, 2, 12 & Aug. 10, 11, 12-1976	
7-76		Filed transcript of record of proceedings, dated Aug. 10, 11, 12, 13-1976	
7-76		Filed transcript of record of proceedings, dated Aug. 19, 20, 23, 24-1976	
7-76		Filed transcript of record of proceedings, dated Aug. 25, 26, 27, 30-1976	
7-76		Filed transcript of record of proceedings, dated Aug. 31, 1976	
7-76		Filed transcript of record of proceedings, dated Sep. 1, 2, 3, 7, 8-1976	
7-76		Filed transcript of record of proceedings, dated Sep. 9, 10, 13, 14, 15-1976	
7-76		Filed transcript of record of proceedings, dated Sep. 16, 17, 20, 21, 22-1976	
7-76		Filed transcript of record of proceedings, dated Sep. 23, 24, 27, 28, 29-1976	
7-76		Filed transcript of record of proceedings, dated Sep. 30, 1976	
7-76		Filed transcript of record of proceedings, dated Oct. 1, 5, 6, 7, 8-1976	
7-76		Filed transcript of record of proceedings, dated Oct. 19, 21, 22, 25, 26-1976	
7-76		Filed transcript of record of proceedings, dated Oct. 27, 28, 29-1976	
7-76		Filed transcript of record of proceedings, dated Nov. 1, 2, 3, 4-1976	
2-76		Filed transcript of record of proceedings, dated 11-5, 6, 7, 8, 9, 10, 11, 12-1976	
7-77		Filed Dfts. Notice of Appeal from Judgment XXXX Entered 1-21-77. (mailed notice)	
1-77		Filed Judgment & Commitment (Atty. Nicolas Figueroa Present) The Dft. is hereby committed to the custody of the atty. gen. or his authorized representative for imprisonment for a period of TWO (2) YEARS on Each Counts 1, 28 & 29, to run currently to each other. Pur. to T. 21, Sec. 841, U.S. Code, the dft. is placed on Special Parole for a term of THREE (3) YEARS, on each of Counts 1, 28, & 29, to commence upon the expiration of his confinement. Bail cont'd pending appeal.Owen J. Issued Commitment 1-31-77	

INDICTMENT

(pp. 6-7)

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

1. In and about October, 1968, the defendants JUAN ANTONIO ALVAREZ, a/k/a "Tony," ANGEL RODRIGUEZ, a/k/a "Angelo," and JOSE LUIS SUREDA, a/k/a "Luis," sold approximately 15 kilograms of cocaine in New York, New York.

2. Thereafter, in and about November, 1968, the defendants SOLON GLAZE, a/k/a "Solo," LAWRENCE MITCHELL, a/k/a "L.J.," JOHN MORRIS, a/k/a "Papers" and JOSEPH SAMPSON a/k/a "Bootnose" purchased cocaine in New York, New York.

3. In and about 1968, the defendants AL WILLIAMS, a/k/a "Big Al from Chicago," DONALD O'DOOD, and another person purchased approximately three kilograms of heroin in New York, New York.

4. In and about March or April, 1969 the defendants ANGEL RODRIGUEZ, a/k/a "Angelo," and LUIS SUREDA, a/k/a "Luis," sold approximately 20 kilograms of cocaine in New York, New York.

5. In and about 1969 the defendant SIDNEY FOSTER a/k/a "Chinch," traveled to New York approximately four times each month to pick up eighth-kilogram quantities of heroin and cocaine for the defendant WILLIAM HIGHTOWER.

6. In and about 1969, the defendant FRANK MOTEN, a/k/a "Uncle," received large amounts of money in New York City.

7. In and about February, 1970, the defendants JOHN CAPRA, a/k/a "Johnny Hooks," LEOLUCA GUARINO and STEVEN DELLACAVA, a/k/a "Beansie," had a conversation in Madison Square Garden in New York City.

8. In and about October 1970, the defendants FRANK MOTEN, a/k/a "Uncle," JUAN ANTONIO ALVAREZ, a/k/a "Tony," ANGEL RODRIGUEZ, a/k/a "Angelo," WILLIAM HIGHTOWER, TOMMY DAVIS, a/k/a "Bipty," JOSEPH SAMPSON, a/k/a "Bootnose," LOIS SAMPSON, and MICHAEL PARKER, met in Atlanta, Georgia.

9. In and about May, 1971, the defendant FRANK MOTEN, a/k/a "Uncle," delivered money to the defendant SOLON GLAZE, a/k/a "Solo", to be used in the purchase of narcotics.

10. In and about 1971 the defendant FRANK MOTEN, a/k/a "Uncle," delivered money to the defendant JOHN MORRIS, a/k/a "Papers", to be used in the purchase of narcotics.

11. In and about the Fall of 1971 the defendant SEBASTIAN INTERSIMONE, a/k/a "Benny," a/k/a "Mr. B," sold approximately four kilograms of heroin in New York, New York.

12. Thereafter, in and about the Fall of 1971, the defendants WILLIAM HIGHTOWER, JOSEPH SAMPSON, a/k/a "Bootnose," and LOIS SAMPSON, purchased heroin in New York, New York.

13. In and about the fall of 1971, the defendants JUAN ANTONIO ALVAREZ , a/k/a "Tony," ANGEL RODRIGUEZ, a/k/a "Angelo," and JOSE LUIS SUREDA, a/k/a "Luis," sold approximately 15 kilograms of cocaine in New York, New York.

COUNT TWENTY-EIGHT

The Grand Jury further charges:

In and about May, 1971, in the Southern District of New York, TOMMY DAVIS a/k/a "Bipty," the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one-eighth kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT TWENTY-NINE

The Grand Jury further charges:

In and about December, 1971, in the Southern District of New York, TOMMY DAVIS, a/k/a "Bipty," the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one-quarter kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

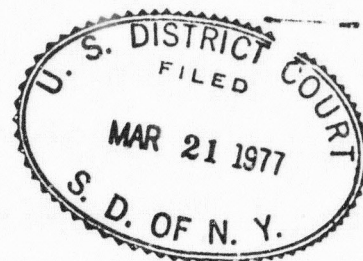
Appellant - Request to Charge

9a

COUNSELOR AT LAW
277 BROADWAY
NEW YORK, N. Y. 10007
(212) 962-4280

Request to Charge
(Tommy Davis)

Prior Similar Acts-Other Crimes*



There has been testimony concerning a 1970 arrest of the defendant Tommy Davis for possession of 175 street bags of heroin. That episode constitutes evidence of a prior similar act and is to be considered by you solely on the issue of determining Davis' motive or intent in becoming a member of the conspiracy charged in the indictment.

This 1970 arrest is not to be considered by you as constituting direct evidence of Davis' participation in the conspiracy charged in Count One. Therefore, even if you find that the possession did in fact occur, that fact by itself would be insufficient to find Davis guilty of conspiracy, unless you find sufficient independent evidence to establish each and every element of the crime of conspiracy beyond a reasonable doubt, exclusive of the evidence pertaining to the 1970 arrest.

Nor is the 1970 arrest to be considered by you in any manner whatsoever in weighing the evidence concerning substantive counts Nos. 28 and 29 charging Davis with the possession of narcotics with the intent to distribute.

Respectfully submitted,

Nicholas Figueroa
Nicholas Figueroa
Counsel for Tommy Davis

*This request to charge is meant to modify an earlier request concerning similar acts which was incorporated in Defendant Davis' request concerning the Marshalling of the Evidence.

Request to Marshall the Evidence
(pp. 10a-13a)

10a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :

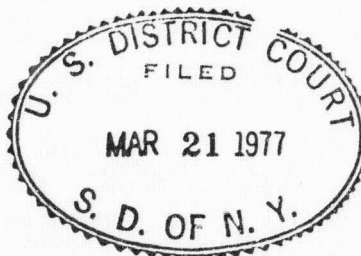
-v- :

76 Cr. 324 (RO)

JUAN ANTONIO ALVAREZ, et al., :

Defendants. :

-----X



REQUESTS TO MARSHALL EVIDENCE

NICHOLAS FIGUEROA
COUNSEL for Defendant TOMMY DAVIS

242

REQUEST TO CHARGE
(TOMMY DAVIS)

MARSHALLING OF EVIDENCE

The government's evidence concerning the defendant Tommy Davis rests almost entirely on the testimony of Jack Brown (1213-1222). Generally, he testified that Davis and he had had a drug based relationship from 1968 to 1972 (1213-1214).

More specifically, Brown also testified concerning two separate transactions with Davis, wherein he claimed to have given drugs to Davis (1220-1221). These two alleged transactions constitute the two substantive charges against Davis, set forth in the body of the indictment as counts 28 and 29, both of which I previously read to you.

It is contended, that Michael Parker supplies virtually the only corroboration of Brown's testimony regarding Tommy Davis. Parker testified that during 1971 and part of 1972, Davis was a frequent visitor to the Brown residence, then located at 180 West End Avenue (3419-3420). Moreover, Parker testified that on one occasion Brown told him that he had given Davis one ounce of cocaine (3421-3422).

When I say that Parker's testimony, in substance, constitutes the only corroboration of Brown's testimony relative to Tommy Davis, it is of the utmost importance that you hear in mind that Sgt. Alfred Pepe's testimony (5598-5608) concerning Davis' 1970 arrest for possession of 175 street (5625) bags of heroin (Exhibit 52) is not to be considered by you in any manner in your determination of Davis'

guilt concerning Counts 28 and 29.

That episode constitutes evidence of an alleged similar act which I have (will explain) explained to you more fully in another part of my instructions, suffice it to say that such a similar act is to be considered by you solely in determining Davis' alleged participation in the conspiracy charged in the indictment.

In this latter regard you may assume, as indicated by the stipulation which I read to you that Davis was not a member of the conspiracy at least from February 14, 1974 to February 17, 1976, because of his conviction of the aforementioned similar act involving the 175 street bags of heroin.

Counsel for Davis contends that Jack Brown's testimony is unworthy of belief, in support of this contention and he stresses the apparent disparity between Brown's Grand Jury and Trial testimony.

For instance, in testifying before the Grand Jury, Brown swore that the December 1971, transaction (count 29) took place at some time between November 1971 and Todd's death in January 1972 (2308-2309). Conversely it is pointed out that during trial Brown testified that it happened on November 24 or 25, 1971.

Further in support of this position, counsel invites your attention to Brown's answers during cross examination wherein he testified that he had, on 3 or 4 occasions prior to testifying on trial, made statements to the effect that the alleged transaction had taken place between November 1971 and January 1972 (2309).

13a

In addition Davis also maintains that Brown seeks revenge against him because of their argument concerning the amorous attentions of a young lady by the name of Mickey (2310-2311).

Respectfully submitted,

NICHOLAS FIGUEROA
COUNSEL for TOMMY DAVIS

1 rmh 11

Brown-direct

2 Q Tell us about that.

3 A I sold it to her for her personal use.

4 Q With what frequency?

5 A Every other day.

6 Q What amounts?

7 A An eighth of an ounce, small portions, quarter
8 of an ounce.

9 Q I believe you testified concerning an individual
10 named Tommy Davis today in court, is that correct?

11 A I did.

12 Q Do you know him by any other name?

13 A Yes. I call him Bipty.

14 Q When did you meet Tommy Davis?

15 A In 1944.

16 Q Where was that, what city?

17 A Washington, D.C.

18 Q Did there come a time when Tommy Davis began
19 purchasing drugs from you?

20 A Yes, there came a time he did.

21 Q When was that and where was that?

22 A This was in 1968, in New York City.

23 Q Will you explain to the jury and the court the
24 circumstances under which Tommy Davis first began to purchase
25 drugs from you?

1 rmh 12

Brown-direct

2 A Well, Tommy and I became very close to one another
3 in 1967. In the beginning of 1967, until 1968, he and I would
4 be considered close friends. He was with me every day.
5 During these days in 1967 he would always ask me to put
6 him in position to sell -- he wanted to sell some drugs. I
7 told him no, because I didn't feel that it was necessary for
8 him to go into it because he didn't know what he was doing,
9 I told him. In 1968 he again asked me and I told him that
10 I would, but at this time I think that I had told him the
11 what and whatnots, as far as I knew, for his own protection.
12 So as a result of that he said that he was ready and I gave
13 him some drugs, gave him maybe a half of an eighth of heroin
14 and three or four ounces of cocaine.

15 Q Half an eighth would be a little over two ounces,
16 is that correct?

17 A A half an eighth would be a little over two ounces?

18 Q Is that right?

19 A Yes, it would be.

20 MR. FIGUEROA: Your Honor, may we have a time
21 on this?

22 THE COURT: 1968, I understood?

23 THE WITNESS: That's correct.

24 Q Did you continue to sell drugs to Tommy Davis
25 thereafter?

1 rmh 13

Brown-direct

2 A I did.

3 Q For how long, until what period of time?

4 A From 1968 until 1972.

5 Q What kind of drugs did the defendant Tommy Davis
6 purchase from you?

7 A Cocaine, mostly, and several times he bought
8 heroin.

9 Q With what frequency?

10 A Once or twice a month.

11 Q Do you recall any particular transactions that
12 you had with the defendant Tommy Davis?

13 A Yes, I do.

14 Q Will you tell us about those, please?

15 A In 1970 Bipty came to my house. He told me that
16 he had had some trouble in Newark with the Police Department,
17 meaning that he had gotten busted --

18 MR. FIGUEROA: Your Honor, I am going to object
19 at this time. I ask the Court to strike.

20 THE COURT: Mr. Beller, come up a minute, will you.

21 (At the side bar)

22 THE COURT: What is your objection?

23 MR. FIGUEROA: I would move at this time for
24 a mistrial. There has been no foundation laid for this
25 arrest at this time. It definitely prejudices the jury

17a

1 rmh 14

Brown-direct

2 against the defendant and there has been no foundation laid
3 for it and I really think that whatever the witness says
4 at this time prematurely as this matter has been brought up,
5 that they are going to be prejudiced against the defendant
6 and no limiting or remedial instruction by the Court can
7 rectify the situation.

8 THE COURT: This I gather is the bust on which
9 they got however many packages of heroin it was from his car,
10 right?

11 MR. BELLER: We are certainly going to contend
12 that it was.

13 THE COURT: And therefore these are drugs involved
14 in this conspiracy.

15 MR. FIGUEROA: But at this time it is premature.
16 I intend to submit a memo to the effect that this arrest
17 is not admissible at this time. We had a motion to suppress
18 on this matter which had only to do with the Fourth Amendment
19 issue and nothing to do with the admissibility of the arrest
20 as far as prejudicing --

21 THE COURT: Didn't you move to suppress and it
22 was denied?

23 MR. FIGUEROA: Yes, your Honor.

24 THE COURT: That leaves the government free to
25 put in evidence of this heroin.

1 rmh 15

Brown-direct

2 MR. FIGUEROA: No, it doesn't, your Honor. I
3 would move to not have this evidence submitted at this time
4 or at any time based on Rule 403 of the federal rules.

5 THE COURT: What is that rule?

6 MR. FIGUEROA: That rule says, your Honor, that
7 evidence although relevant is not admissible if it has a
8 tendency to prejudice the jury and its probative value is
9 otherwise outweighed and that has nothing to do with the
10 motion to suppress.

11 THE COURT: Mr. Beller, he is going to say that
12 Davis had a talk with him about this. Is this stuff that
13 Brown had sold him?

14 MR. BELLER: Yes.

15 THE COURT: Objection overruled.

16 MR. FIGUEROA: It may be what he told him
17 but the fact that he was arrested is completely wide of the
18 mark and has nothing to do with this witness' testimony,
19 is unnecessary and prejudicial and is probative of nothing.

20 THE COURT: The government is going to be able to
21 get into the fact that on this arrest they hooked him up
22 with a certain amount of drugs, which is probative of the
23 fact that he is a member of this conspiracy, am I right,
24 assuming the jury credits it?

25 MR. FIGUEROA: Let me move at this time, in the

1 rmh 16

Brown-direct

2 alternative, if I can't have a mistrial, to sever and if that
3 is denied, I would ask at this time that any evidence con-
4 cerning this arrest be held inadmissible under Rule 403 of
5 the Federal Rules of Evidence.

6 THE COURT: No. All that is being offered at
7 this point is a conversation which is in the fabric of this
8 conspiracy, as I see it. I will deny all the motions.

9 MR. BELLER: Could I have the last thing the
10 witness said read back?

11 THE COURT: I think he said Davis came to him --

12 (Record read)

13 (In open court)

14 BY MR. BELLER:

15 Q What was the nature of the problem that the
16 defendant Tommy Davis had had in Newark?

17 MR. FIGUEROA: At this time, your Honor --

18 THE COURT: Sustained. What did Davis tell him?

19 Q Would you continue the conversation you were
20 telling us about, between you and Tommy Davis, concerning
21 his arrest in Newark?

22 MR. FIGUEROA: I must object at this time and
23 move for the withdrawal of a juror.

24 THE COURT: Denied.

b3 25 A You are speaking about the conversation that he

rmh 17 Brown-direct

had told me about concerning the incident of his being arrested?

Q Yes.

A He came to my house and he told me that he had been arrested and charged with possession of narcotics--

Q What kind of narcotics?

A Heroin.

Q Did he tell you where he got it?

A He told me it was the heroin I had given him.

MR. FIGUEROA: Your Honor, may I have a continuing objection to this line of testimony?

THE COURT: For the limited time we are on it. It doesn't continue too long, Mr. Figueroa, all right? The objection is overruled.

MR. BELLER: I think we are finished, your Honor.

Q When did this occur?

MR. BELLER: I am not sure whether we have set a time for this or not, your Honor.

THE COURT: What was the date of this conversation, year, month or otherwise?

THE WITNESS: November of 1971.

Q November of 1971?

A November, '71?

Q What was the date of this conversation that you

1 rmh 18

Brown-direct

2 had with Tommy Davis?

3 MS. ROSNER: Objection. Asked and answered twice.

4 THE COURT: Overruled. What is your best recol-
5 lection as to when you had this conversation with Tommy Davis?

6 THE WITNESS: Some time in 1970, the latter part.

7 Q Thereafter did you have a transaction with Mr.
8 Davis, the defendant, involving -- withdrawn.

9 You were telling us about particular transactions
10 you remembered with respect to defendant Tommy Davis?

11 A That's correct.

12 Q Will you go ahead with that, please?

13 A Say that again?

14 Q Will you continue with that, please? Tell us
15 about any particular transactions you can recall involving
16 narcotics.

17 A You want me to continue as to other incidents?

18 Q Yes.

19 A I had a birthday in 1971, in May, and it was
20 given at the Waldorf Astoria. After the birthday party
21 for me people came to where I was living, 180 West End Avenue,
22 and at this time Tommy and his wife were present and Tommy
23 was waiting for everybody to go home because--

24 MR. FIGUEROA: Objection, your Honor.

25 THE COURT: Overruled.

rmh 19

Brown-direct

1221

1 A -- we had made arrangements during the time,
2 the course of the party, that I was to sell him some heroin
3 and some cocaine, and after everybody had left, I gave
4 him the packages and it was the heroin and the cocaine. I
5 think it was an eighth of each.
6

7 Q Do you recall any other transactions?

8 A I had a party for my son, Todd, in November,
9 when he was in the hospital --,

10 Q What kind of party?

11 A A birthday party for him, in the hospital. A few
12 people came, but later on, at night, some people came to
13 my house and we were having a few drinks and Tommy was
14 present at this time because he had told me the day before
15 Todd's party that he was coming to the house that night--

16 MR. KRIEGER: May we have the specific time, as
17 well as we can, your Honor?

18 THE COURT: He has already done that. Go ahead.

19 A Some time after the people had left, I sold him
20 an eighth or a quarter of cocaine.

21 THE COURT: When was this, Mr. Brown?

22 THE WITNESS: This was in November, November 24th
23 or 25th.

24 THE COURT: Of what year?

25 THE WITNESS: 1971.

1 rmh 20

Brown-direct

2 Q To your knowledge, Mr. Brown, does the defendant
3 Tommy Davis have a brother?

4 A Yes, he does.

5 Q What is his name?

6 A Bernard Davis.

7 Q Does he have a nickname?

8 A He is called Big Bipty.

9 MR. BELLER: Your Honor, this would be a convenient
10 time for me.

11 THE COURT: All right. Ladies and gentlemen, we
12 will be in recess until a quarter past 2.

13

14 (Luncheon recess)

15

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gws

Brown - cross

2307

THE COURT: Please. When I am making a ruling you just wait a minute.

Ladies and gentlemen, as I instructed you at the beginning of this case, nothing contained in a question to which there is no answer is evidence. Therefore, disregard it.

MR. FIGUEROA: My apology, your Honor.

Q You were under the influence of cocaine at that time, is that correct?

A At which time, sir?

Q During that Fort Lee incident.

A You mean when they were carrying me to another jail?

Q Yes.

A No, I was not.

Q Had it worn out by that time?

A No, I was not.

Q Had the effect worn off by that time, is that what you are saying?

A Yes.

Q On your direct you testified about a meeting with Thomas Davis that occurred between Todd's birthday in November, 1971, and his death in January of 1972, is that correct?

1 gws

Brown - cross

2308

2 A At his death in '72, I don't think I said that.
3 I think I said at his birthday party, right after his
4 birthday party. I don't recall saying at his death.

5 Q Did you ever tell anybody or anyone that it was
6 between those two dates?

7 A I don't recall saying it was between those two
8 dates.

9 Q Let me show you what has been marked for
10 identification as 3505-F, page EC-5, and the same exhibit,
11 EC-10, the parts I have indicated (handing).

12 A May I read the whole thing?

13 Q You may read whatever you want, sir.

14 And I ask you whether that doesn't refresh your
15 recollection as to whether you told anybody on more than
16 once instance that the meeting took place between November
17 of '71 and January '72?

18 A I read it.

19 Q Did you read both portions on both pages?

20 A Yes, I read it.

21 Q Does that exhibit refresh your recollection as
22 to ever having told anybody that the meeting took place
23 between those two dates?

24 A Between Todd's birthday and his death?

25 Q Yes.

gws

Brown - cross

2309

1
2 A Yes, sir, it does.

3 Q On how many occasions prior to this trial did
4 you make that statement?

5 A I don't recall how many times.

6 Q Does it refresh your recollection as to the
7 number of times that you found out about while you were
8 sitting on the stand?

9 A Maybe three or four times.

10 Q Could that meeting have happened at some other
11 time other than the one you indicated, even now at this trial
12 or some other time?

13 A No, it couldn't have.

14 Q Most of the time you have told us, Mr. Brown,
15 you were under the influence of cocaine, is that correct?

16 A Most of the time or some of the time, yes.

17 Q There were periods of time you were continuously
18 under the influence of cocaine?

19 A At certain periods.

20 Q And cocaine has the effect, does it not, Mr.
21 Brown, of changing your ability to recall things and your
22 perception, is that correct?

23 A No, just the opposite.

24 Q What is its effect on you?

25 A It makes you feel relieved of a lot of pressure

gws

Brown - cross

2310

1 and you feel more resigned and more tranquil.

2 Q You told us about an incident, I believe, Mr.
3 Brown, of Don Hayne's farm, is that correct?
4

5 A Yes, that's correct.

6 Q And that incident I believe you testified that
7 you saw some moving tree, is that also correct?

8 A At night, yes.

9 Q And you shot the tree, is that right?

10 A Shot at it, yes.

11 Q And you were under the effects of cocaine at
12 that time, is that right?

13 A I might have been.

14 Q Was there another incident, Mr. Brown, when you
15 were at the training camp of Muhammad Ali in which you
16 also shot at certain things?

17 A Not to my knowledge. I can't remember that.

18 Q Does the name Boudini Brown mean anything?

19 A Yes, it does.

20 Q Was he involved or was he present at a time
21 when you used a pistol or a gun?

22 A Never.

23 Q Your wife Jan, Mr. Brown, had a very close
24 friend, is that correct, by the name of Micky.

25 A They were close at one time, yes.

gws

Brown - cross

2311

Q When did they stop being close?

A I don't know whether they are close now or not.

I haven't seen Jan.

Q And you sort of had eyes for Micky, didn't you?

A Eyes?

Q You admired her as a woman, didn't you?

A I admired her ability, yes.

Q And you admired her sexually as a woman?

A Never.

Q Please don't become offended, Mr. Brown, but did there ever come a time when you tried to arrange a date for your wife Jan with somebody else?

A Never.

Q Did there come a time, Mr. Brown, when you had an argument with Thomas Davis involving the attractions or relationship between Thomas Davis and Micky? Did you have an argument about that?

A No, sir, never.

Q Isn't that the reason why you are now testifying against Thomas Davis?

A Absolutely not.

MR. FIGUEROA: I have no further questions, your Honor.

ws2

Brown - redirect

2687

1 to it in that form.

2
3 Q Mr. Brown, you recall that Mr. Figueroa
4 questioned you concerning your testimony in the grand jury
5 with respect to Thomas Davis, do you recall that?

6 MR. KEEGAN: Objection, your HONor.

7 THE COURT: He can focus to that extent.

8 MR. KEEGAN: I thought the Government had
9 consented to delete the attorneys' names in the questions.

10 THE COURT: I think it is entirely appropriate
11 to call attention to what attorney was questioning him
12 so he can focus in his mind on the subject matter that
13 he is being addressed to.

14 Go ahead.

15 Q Do you recall that Mr. Figueroa asked you
16 whether you had testified in the grand jury as to trans-
17 actions relating to Todd's birthday in November, 1971,
18 and --

19 MR. FIGUEROA: Objection, your Honor.
20 Improper redirect.

21 THE COURT: In what respect?

22 MR. FIGUEROA: Your Honor --

23 THE COURT: Did you examine in that area?

24 MR. FIGUEROA: I think he misstated what I
25 asked.

ws3

Brown - redirect

2688

1
2 THE COURT: Did you ask about matters in
3 that area?

4 MR. FIGUEROA: I did, your Honor.

5 THE COURT: That is what he is saying.
6 He is directing him to that.

7 MR. FIGUEROA: Mr. Beller is using a specific
8 date which I never used. I just used a span of time.

9 THE COURT: Go ahead.

10 Q Mr. Brown, do you recall testifying in the
11 grand jury on March 1, 1976?

12 A Yes, sir, I do.

13 Q Could it have been March 2nd?

14 A It was some time in March.

15 Q Counsel have asked you whether you recall
16 testifying in the grand jury on October 8 or October 9
17 or various dates or whether you had interviews with
18 various FBI agents on various dates. You have assume
19 that the dates they have given you are correct, is that
20 not right?

21 A Yes.

22 Q When they asked you if you recalled conversations
23 you had word for word from a year ago and you said you
24 did, you assumed they were probably reading from tran-
25 scripts?

1 ws4

Brown - redirect

2689

2 MR. FIGUEROA: I object.

3 MR. ANOLIK: That is not a question, it is a
4 statement.

5 THE COURT: Yes, sustained.

6 Q Mc. Brown, when counsel have asked you whether
7 a certain document refreshes your recollection as to
8 something -- withdrawn.9 MR. BELLER: Mr. Sear, would you show the
10 witness 3505-F.11 Q Would you direct your attention to page 5,
12 which says at the top EJC-5.

13 Do you have that?

14 A Yes.

15 Q Mr. Brown, were you asked these questions
16 and did you give the following answers?

17 MR. KEEGAN: Page, please.

18 MR. BELLER: EJC-5, March 1, 1976.

19 Q These are minutes of grand jury testimony, are
20 they not?

21 A Yes.

22 Q Before coming to this trial, have you ever seen
23 any of your grand jury testimony?

24 A No, sir.

25 Q You were being questioned by me at this time,

ws5

Brown - redirect

2690

1 were you not?

2 A Yes, I am.

3 Q Were you asked the following questions and
4 did you give the following answers:
5

6 "Q Now, in about November of 1971 --,
7 withdrawn.

8 "You had a son named Todd, did you not?

9 "A Yes."

10 Do you have where I am, Mr. Brown?

11 A Yes.

12 Q "Q His birthday is in November, is that
13 right?

14 "A November 23rd.

15 "Q Your son Todd died January 13th, is
16 that correct?

17 "A Of '72."

18 MR. FIGUEROA: I will object at this time asd
19 to the relevance of this redirect.

20 THE COURT: If it is a question of relevance,
21 I will overrule it.

22 MR. FIGUEROA: I am further going to object
23 as to the reading of testimony when there is no issue
24 before the Court as to whether he said what Mr. Beller is
25 reading at this time. I object to his reading from an

gws

Brown - redirect

2691

exhibit which is not in evidence for purposes of supporting his witness' testimony.

THE COURT: Overruled.

Go ahead.

Q You recall that Mr. Figueroa directed your attention to page EJC-5 of the minutes of the grand jury of March 1, 1976?

A Yes, sir.

Q So let's continue.

MR. FIGUEROA: Your Honor, I would object to that.

THE COURT: Overruled.

Q "Q Of '72?

"A Correct.

"Q Between his last birthday party in November of 1971 and his death in January of 1972, did you have occasion to sell approximately a quarter kilogram of cocaine to Tommy Davis?

"A Before his death?

"Q Before Todd's death.

"A Yes, yes.

"Q But after his birthday party?

"A Correct."

Do you recall those questions and giving those

1 gws

Brown - redirect

2692

2 answers, Mr. Brown?

3 MR. FIGUEROA: Your Honor, I move to strike
4 at this time and I object to that reading of the testimony.
5 This testimony was not read during cross-examination.
6 Mr. Beller has read it unnecessarily at this time and
7 improperly.

8 THE COURT: Overruled. There is no answer
9 to the last question.

10 Q Do you recall giving those answers to those
11 questions?

12 A In the grand jury?

13 Q In the grand jury.

14 A Yes, I do.

15 Q I gather by that you mean that if it's written
16 here --

17 MR. FIGUEROA: Objection.

18 THE COURT: You have an answer.

19 Let me hear the question again.

20 (Record read.)

21 Q Mr. Brown, let me direct your attention now
22 to page EJC-10 of that same exhibit.

23 Do you recall that Mr. Figueroa directed your
24 attention to this portion of the testimony in his cross-
25 examination?

1 gws

Brown - redirect

2693

2 MR. FIGUEROA: Your Honor, I will object for
3 the same reason at this time, and on the basis of Federal
4 Rules of Evidence, Section 403, I ask the Court not to
5 allow Mr. Beller to read further from grand jury minutes
6 which are not in evidence and which were never read on
7 the witness' cross-examination.

8 THE COURT: We are going to take a recess at
9 this point, a very short recess.

10 (Jury leaves courtroom.)

11 THE COURT: Mr. Figueroa, I understand that
12 you are saying to me that if you have attacked certain
13 testimony as being erroneous or false and if you used
14 certain pages of grand jury minutes to help you do that
15 the Government is not able to put in the whole page?

16 MR. FIGUEROA: That is not my point. I merely
17 showed the witness grand jury testimony to refresh his
18 recollection. I never read any portion of the grand
19 jury testimony into evidence.

20 What Mr. Beller now seeks to do, if the Court
21 please, he is going to repeat, for all intents and
22 purposes, the transaction which he has already read to
23 the grand jury and which I deem is improper, your Honor.
24 He is going to repeat that again merely because I asked
25 the witness whether both those pages refreshed his recol-

1 gws

Brown - redirect

2694

2 lection. They both refer to the same transaction and
3 they are redundant, your Honor, and all that he is doing
4 is he is repeating prejudicial testimony before the grand
5 jury on the same transaction for no reason. He no
6 longer has to repeat it, your Honor. It is the same
7 transaction. He is going to do it again.

8 THE COURT: Mr. Figueroa, I don't represent
9 that I have an infallible memory here, but it does seem
10 to me that you attacked this area with the implication
11 that these transactions had never occurred, that Mr. Davis
12 had never engaged in this at all. There was a little
13 bit of cross roughing as to whether it was before Todd's
14 death or before somebody else's death, if I am not mistaken,
15 and the conclusion that was suggested was that this had
16 not happened and the witness' testimony on direct in this
17 case was not so, and it seems to me Mr. Beller is entitled
18 to read from these minutes which you had occasion to show
19 the witness to demonstrate that at another time he testified
20 in this area.

21 MR. FIGUEROA: If the Court please, my intent,
22 and it was a limited intent at the time, was merely to
23 show that the witness was impeachable as far as his recall,
24 and my only reason for putting this forth was to show
25 that he was off on his dates and I was going to explore it

gws

Brown - redirect

2695

1 further. I decided not to. I never said and I never
2 intended for the jury to think that the transaction had
3 not taken place. It was only a matter of testing
4 his ability to recall dates. I am sure the transcript
5 will bear me out.
6

7 THE COURT: You used the minutes to establish
8 that at the time he testified as to a certain date it was
9 incorrect.

10 MR. BELLER: I can hardly imagine Mr. Figueroa
11 is going to concede that these transactions took place
12 whether in November or January.

13 THE COURT: He is questioning only the date.
14 I agree with you on that observation, which I was making
15 as I was hearing the argument.

16 The objection is overruled.

17 We will take our recess.

18 MR. KEEGAN: This pertains to all of us.
19 I agree with Mr. Figueroa that Mr. Beller has a right to
20 approach the witness with other documents to refresh his
21 recollection and to rehabilitate him as to when certain
22 events took place. All he is doing is putting in the
23 grand jury testimony to convict these people. That's
24 all he is doing.

25 THE COURT: There is an ancient old rule of

1 gws

Brown - redirect

2 law which I am sure you are aware of that if direct
3 testimony is attacked as a recent fabrication you may put
4 in what the man has earlier testified to that matter some-
5 where else.

6 MR. FIGUEROA: Your Honor, there has been no
7 attack. May I look at the transcript? May I have
8 an opportunity to show the Court that?

9 THE COURT: Weren't you attacking Mr. Brown on
10 the theory he never sold your client narcotics?

11 MR. FIGUEROA: Only his ability to recall
12 dates.

13 THE COURT: Implicit in that is the claim he is
14 a liar and the transaction never took place.

15 MR. FIGUEROA: Your Honor, may I look at the
16 transcript in the case?

17 THE COURT: I will entertain any application
18 you make to me after the recess.

19 (Recess.)

20 (Jury not present.)

21 MR. KEEGAN: I want to make an application
22 about the use of attorneys' names in connection with
23 questions asked on cross-examination.

24 THE COURT: I don't see that there is any
25 need to identify who a client is represented by, although,

gws

frankly, it is only the discomfort of counsel I am paying attention to here.

I deem it appropriate that the witness get some focus of what the redirect has to do with, and I see no harm whatsoever in bringing out who was the questioning attorney at the time of cross-examination that is being addressed.

MR. KEEGAN: There may be instances where that is appropriate, I would agree, but to phrase every question in that respect it seems to me puts the credibility of the lawyer who asked the question into the case. It is putting the lawyers on trial and implying that they are misleading, misrepresenting and perhaps lying to the jury in defending their clients. We are becoming on trial.

THE COURT: Mr. Keegan, in 23 years of being an Assistant U. S. Attorney, an anti-trust lawyer, a defense counsel, civil trial practitioner, I have hundreds of times asked a witness:

"You heard Mr. Jones ask you on cross-examination blah, blah, blah."

What changes this case?

MR. KEEGAN: In six and a half years of being an Assistant United States Attorney, an Antitrust Division attorney, a civil defense attorney, a criminal attorney,

1 gws Brown - redirect
2 I object to it. I think there are appropriate times
3 for it if it helps the witness to focus on a particular
4 question, but to preface every single question with
5 "Did so-and-so ask you" seems to imply to the jury that
6 so-and-so was misleading the jury and puts the lawyers'
7 credibility in issue.

8 MR. BELLER: I assume, Mr. Keegan, when you
9 kept referring to Mr. Beller's direct examination you
10 weren't implying I was misleading the witness, were
11 you?

12 MR. KEEGAN: No.

13 MR. BELLER: Neither am I.

14 THE COURT: Your position is noted but I
15 decline to act on it.

16 MR. FIGUEROA: Your Honor, may I be heard
17 on my point?

18 THE COURT: All right.

19 MR. FIGUEROA: Your Honor, the reason I object
20 to Mr. Beller's redirect is as follows:

21 The question that I propounded to the witness
22 on page 2307, on the bottom, was:

23 "On your direct you testified about a meeting
24 with Thomas Davis that occurred between Todd's
25 birthday and his death in January" et cetera.

gws

Brown - redirect

2699

1 Speaking about a meeting. Mr. Beller has
2 seized upon my question concerning the meeting between
3 those two dates and he has read into evidence the entire
4 grand jury testimony --

5 THE COURT: What did you then ask him about
6 that meeting?

7 MR. FIGUEROA: I asked him whether there was
8 a meeting between those two dates and whether he had
9 ever said the meeting was between those two dates.
10 I didn't ask him about the transaction.

11 THE COURT: You inferred to the jury the
12 meeting never took place.

13 MR. FIGUEROA: No.

14 THE COURT: What did you ask him for, then?

15 MR. FIGUEROA: To test his ability to
16 recall. This witness has been on the stand for a
17 week, your Honor.

18 THE COURT: You were going at this as if you
19 were trying to demonstrate that while there was such a
20 meeting it took place at some other time.

21 MR. FIGUEROA: Exactly.

22 THE COURT: Did you concede that there was a
23 narcotic transaction but that the Government just had it
24 at the wrong time?
25

1 gws

Brown - redirect

2700

2 MR. FIGUEROA: I didn't ask about the narcotic
3 transaction.

4 THE COURT: Stick with my question because it
5 seems to me that the rule you are talking about is where
6 you are trying to demonstrate that something happened
7 but at some other time and it is necessarily your position
8 here that it never happened at all. That is what you
9 are attacking.

10 MR. FIGUEROA: No. I will tell you why.

11 THE COURT: I disagree with you. I under-
12 stand your position. I don't think we need take any more
13 time.

14 (Continued on next page.)
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Brown-redirect

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MR. FIGUEROA: Just one more point, if I might, your Honor. At this point it is cumulative. Mr. Beller has already read into evidence grand jury testimony on that same transaction, and now merely because I showed the witness two pages of identical grand jury testimony, he wants to ask him the question again, and at this time, your Honor, I submit it is cumulative. The grand jury testimony has been sufficiently presented, and I think it is improper under Rule 403, I think the court in its discretion should exclude it on the basis it is highly prejudicial and of no probative value.

THE COURT: That is denied.

MR. BELLER: Your Honor, are we going to have some ground rules about objections to my redirect? It seems obvious there are going to be objections to every question.

THE COURT: Yes. We will have to play it by ear.

MR. BELLER: I don't mind that, but may we have an instruction that there be no colloquy?

MR. COHN: Your Honor, it is ill met coming from Mr. Beller.

THE COURT: We will see what happens.

(Jury in box; witness on the stand.)

THE COURT: What is Mr. Anolik?

1 mph2

Brown-redirect

2 MR. FRANKEL: It is all right to proceed. I
3 will cover for Mr. Anclik.

4 THE COURT: Mr. Brightman, is that all right
5 with you?

6 DEFENDANT BRIGHTMAN: That is all right, your
7 Honor.

8 BY MR. BELLER:

9 Q Mr. Brown, will you please examine Government
10 Exhibit 350-F for identification and turn to page 10 in
11 that exhibit, page EJC-10, page 10. Do you have it there?

12 A Yes.

13 Q And do you recall that Mr. Figueroa directed
14 your attention to portions of page 10 in his cross-
15 examination? Do you recall that?

16 A Yes.

17 Q Mr. Brown, were you asked the following
18 questions and did you give the following answers:

19 MR. FIGUEROA: Objection. Asked and answered,
20 your Honor.

21 MR. BELLER: If that is so, I will just go ahead.

22 THE COURT: I remember one. Were there two?

23 MR. BELLER: I would like to get an answer from
24 the witness.

25 Q (Continuing) Mr. Brown, were you asked the

1 mph3

Brown-redirect

2 following questions on page 10:

3 "Q And your sale to Tommy Davis of approximately
4 a quarter kilogram of cocaine" --

5 MR. FIGUEROA: Again, your Honor, I object.

6 THE COURT: Yes. Overruled.

7 A Which portion?

8 Q I am on page 10.

9 A But what paragraph?

10 Q The ninth line.

b2 11 A I see it.

12 Q In the middle of the question, beginning with
13 the word "and".

14 A That was around --

15 Q I haven't read it yet.

16 A Is that the part?

17 Q Yes. In that same line:

18 "And your sale to Tommy Davis of approximately
19 a quarter of a kilo of cocaine between the time of Todd's
20 last birthday, in November of 1971 and his death in 1972?

21 "A That was also, that was in Manhattan."

22 MR. FIGUEROA: I object, your Honor, and move
23 to strike. It is the same question that was read.

24 THE COURT: We don't have an answer.

25 Q Do you recall giving that answer to the grand jury?

dws

Parker - direct

3419

left, and to the left he had another room and a garage.

Q What was the -- do you recall anything about the way the house was decorated?

A Yes.

Q What was that?

A He either had purple or lavender carpet on his floor and that was either new or he was ordering some more carpet.

MR. OFFER: Object to that, if your Honor please.

Q What did you observe? That's all we want to know is what you saw.

A All I observed was the purple and that was the carpet, no furniture.

Q As far as you know did this trip that you and Jack Brown took to the gas station and then to the house would that have anything to do with narcotics?

A As far as I know, no.

Q While you were living in New York, again from February '71 to July '72, did you meet a man by the name of Bipty?

A Yes, I did.

Q As a matter of fact you told us yesterday that you had met him earlier, is that right?

dws

Parker - direct

3420

1
2 A Beg your pardon?

3 Q You had met Bipty prior to coming to live in
4 New York, is that right?

5 A Yes, I did.

6 Q But you saw him while you were living in New
7 York?

8 A Yes.

9 Q And where did you see him?

10 A Saw him at 180 West End Avenue and 10 West 66th
11 Street.

12 Q How often did you see him there?

13 A It all depends on how he was coming over at
14 one particular time. Maybe he came over often for two
15 or three months. Then he wouldn't come over for a month
16 or maybe two months. Then he would start coming back
17 over again, maybe once or twice out of a week. It could
18 have been even three times out of the week.

19 Q What did he do when he came to the apartment?

20 A He came over, he visited. Sometimes he
21 brought his wife with him. Sometimes he had a lady with
22 him. Sometimes he would sit around and talk to myself,
23 Jan, or who else was in the apartment. Sometimes he
24 would go into the back room with Jack.

25 Q And how long did he stay on those occasions?

dws

Parker - direct

3421

1 A It depended on how long he was at the apart-
2
3 ment as to whether he went back in the back room to stay
4 with Jack, or when he came over was it just to see Jack.
5 He stayed from a a half an hour to half a day, late into
6 the night time.

7 Q At any time during this period did you have
8
9 a conversation with Jack Brown about the relationship
10 between him and Bipty?

11 A Yes.

12 Q And when to the best of your recollection did
13 such a conversation occur?

14 A Beginning of summer of '71.

15 Q And what did Jack Brown say and what did you
16 say during the conversation?

17 A Jack Brown told me that Bipty was getting
18 cocaine for him, from him.

19 Q Did he say how much?

20 A No.

21 Q Thereafter, after the summer of '71 while you
22 were living in New York did Jack Brown ever tell you how
23 much cocaine he had given Bipty on any occasion?

24 A I remember one particular time, I don't
25 remember exactly when it was. Bipty had been to the
house and he had left and Jack said that he had given him

dws

Parker - direct

3422

an ounce of cocaine.

Q During this period when you were living in New York did you have a conversation with Jack Brown about Bipty's relationship with Frank Moten?

A Yes, I did.

Q Is it true during that conversation that Jack Brown told you that Bipty used to work for Frank Moten?

A Yes, it is.

Q At any time during this period up till July of '72 did you use narcotics?

MRS. ROSNER: It's been asked three times.

MR. SEAR: It has not been asked three times, your Honor.

MR. KEEGAN: Twice.

MRS. ROSNER: Yes, it has three times, four times.

THE COURT: It's been answered at least once.

MR. SEAR: As to a particular point in time, your Honor.

MRS. ROSNER: Just 15 minutes ago he asked him.

THE COURT: Let me hear it back, please?

(Question read.)

1 THE COURT: Will you go on then.

2 MR. SEAR: I'll go on.

3 Q During this period of time when you were living
4 in New York how did you support yourself and your family?

5 A From money I was getting from the print shop.
6 Jackie was working and money from Jack.

7 Q And how much did you get from the print shop?

8 A I was making \$65 a week.

9 Q And where did you go in July of '72?

10 A Back to Maryland.

11 Q And did you have a job there?

12 A Yes, I did.

13 Q What kind of job?

14 A Construction as a laborer.

15 Q After you went back to Maryland when was the
16 next time if ever that you saw Jack Brown?

17 A August of '72.

18 Q And where did you see him?

19 A I saw him and Boot at Lois' apartment in
20 Tacoma Park, Maryland.

21 Q Tacoma Park where?

22 A Maryland.

23 Q Keep your voice up.

24 And who was there on that occasion?
25

1 dwh 1

T5

2 MR. FIGUEROA: I had understood that Mr. Mitchell
3 was going to be heard first, but before Sergeant Pepe
4 goes on I'd like to be heard at least at the side bar as
5 to my arguments to the inadmissibility of the evidence
6 against Tommy Davis.

7 THE COURT: I had a suppression hearing on that
8 Mr. Figueroa.

9 MR. FIGUEROA: That's fine, your Honor. That
10 was to suppress on various grounds. At this time I'm
11 renewing my motion based on the overwhelming prejudice
12 that such an admission of evidence would bring about in
13 the minds of the jury where they would be unable to decide
14 the issues of my client's guilt fairly.

15 THE COURT: My memory is that Jack Brown
16 testified that the stuff that was seized in your client's
17 car was stuff that had come from Brown.

18 MR. FIGUEROA: All well and good, your Honor,
19 but we're dealing here with a seizure that resulted in
20 conviction of my client back in 1972 which I believe just
21 the conviction alone will almost settle the question
22 as far as the jury is concerned as to my client's guilt
23 in this matter, and I don't see where the government
24 has substantiated any overwhelming compelling necessity
25 to bring in this evidence at this time.

1 dwh 2

2 I think if anything it would be more proper
3 to be brought in on rebuttal, your Honor, until they see
4 what the defense is.

5 THE COURT: The government is not offering the
6 conviction I assume. The government is offering the fact
7 that the heroin was in the car.

8 MR. FIGUEROA: Yes, your Honor, but the facts
9 themselves naturally lead to the conclusion that the
10 man was convicted at that time. I mean he was arrested
11 with 175 bags. He went to court. Sergeant Pepe is going
12 to testify that he was taken in, arrested, he went to court.
13 What happened? It wasn't dismissed.

14 THE COURT: I don't know, but I will overrule
15 that objection.

16 MR. FIGUEROA: Well, your Honor, again I would
17 ask for its exclusion on the basis of the section of 403
18 of the Federal Rules of Evidence that probative value is
19 far outweighed by prejudicial value.

20 THE COURT: No. I think it's entirely
21 appropriate if Jack Brown says he was selling heroin to
22 and through your client to prove that your client in fact
23 had that heroin in his car. No. Overruled.

24 MR. FIGUEROA: Your Honor, this was again
25 Newark at a different time and a different place, your Honor.

1 dwh 3 Pepe-direct

2 THE COURT: No, overruled.

3 (Jury in the box)

b2 4 THE COURT: Good morning, ladies and gentlemen.

5 I'm sorry to have held you particularly where all of us
6 made an effort to be here earlier than usual this morning,
7 but we were taking up matters of law as I had Mr. Dorsa
8 inform you that were no matters of your concern, and I'm
9 sorry we had to hold you as long as we did All right.

10 MS. CUSHMAN: Government calls Sergeant Pepe.

11

12 A L F R E D P E P E, called as a witness, having been
13 duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MS. CUSHMAN:

16 Q Sergeant Pepe, I'm going to ask you to talk
17 in a very loud tone of voice so that everybody in the
18 courtroom can hear you and I'm going to ask you to speak
19 very clearly for the same reason.

20 How are you employed?

21 A Newark police officer.

22 Q And how long have you been a Newark police officer?

23 A I'm in my 13th year.

24 MR. BELLER: Your Honor, I am not sure whether
25 I heard whether it was Newark or New York.

1 dwh 4 Pepe-direct

2 A Newark, New Jersey.

3 Q And what did you do in the Police Department
4 in Newark?

5 A Now I'm a patrol supervisor.

6 Q In 1970 toward the end of the year what were
7 you doing?

8 A Assigned to the Narcotic Bureau as a detective.

9 Q Were you on duty November 2, 1970?

10 A Yes, I was at 9 in the morning until 5 at night
11 I was on duty.

12 Q Did you perform any official duties after you got
13 off duty that day?

14 A Yes, I did.

15 Q On November 2nd in the evening did you have
16 occasion to arrest a man named Thomas Davis?

17 A Yes, I did.

18 Q Can you tell us how that came about, where it
19 took place?

20 A On 14th Street and Central Avenue in Newark,
21 New Jersey.

22 Q And did you have a warrant for his arrest?

23 MR. FIGUEROA: Objection, your Honor.

24 THE COURT: No, overruled.

25 A Yes, we did.

1 dwh 5

Pepe-direct

2 Q Can you tell us, describe what took place, what
3 time the arrest took place and how it took place?

4 A Time was approximately around 9:30 in the evening.
5 Observed Thomas Davis coming out of the tavern located
6 at Central Avenue and 14th. Street in Newark, New Jersey.
7 He entered a Cougar, white Cougar with New York plates.
8 He bent over underneath like the driver's side of the car.

9 At this time we approached the car, identified
10 myself as a police officer, and stated that he was under
11 arrest for the warrant that he had. He was taken out of
12 the car.

13 In his pocket was three stacks of glassine
14 envelopes, 25 in each stack, containing a white powder.
15 Also on the floor of the car was a white plastic bag
16 containing four more stacks, 25 in each stack, of glassine
17 envelopes with a white powder in it.

18 Q What did you do at that time?

19 A Well, he was brought down to our narcotic office
20 and processed.

21 Q Did you by any chance perform a field test of
22 any of the material in these glassine envelopes?

23 A Yes, the field test was--

24 MR. FIGUEROA: Objection as to the field test,
25 your Honor.

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Pepe-direct

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THE COURT: No, overruled.

A Yes, the field test was performed on the glassine envelopes.

Q And what was the result of that field test?

A It was a positive reaction.

Q Positive for what?

A An opiate.

Q An opiate?

A Yes, ma'am.

Q What is that?

A It's a narcotic drug which heroin is a derivative of opium.

Q Did you seize anything else from him at that time?

A Yes, there was \$2,300 in his pocket which was confiscated.

Q Now, what happened to the glassine envelopes which you had seized from him? What did you do with them?

A Well, after we initialed it and made out the property voucher and placed it into a property envelope it was brought up to the police chemist for analysis.

MS. CUSHMAN. May we have this envelope marked as Government's Exhibit 52 for identification, 52A.

(Government's Exhibit 52A marked for

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Pepe-direct

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identification.)

MS CUSHMAN: May the record reflect I am opening what has been marked as Government's Exhibit 52A for identification by cutting along the upper edge and removing from the envelope various items.

There are three packets of small envelopes which should be marked as Government's Exhibit 52B for identification. May they be deemed marked your Honor, and we'll describe them.

THE COURT: Yes.

(Government's Exhibit 52B deemed marked for identification.)

MS.CUSHMAN: And a plastic bag containing four more similar packets of glassine envelopes deemed marked as Government's Exhibit 52C for identification.

(Government's Exhibit 52C deemed marked for identification.)

Q Sergeant Pepe, I'm handing you what has been deemed marked as Government's Exhibit 52 for identification. Can you identify and describe those items?

A Yes, I can. These are the three stacks, 25 in each stack that was removed from the coat pocket of Mr. Davis.

Q And how do you identify them as those stacks?

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Pepe-direct

5603

1 A My initials here on the glassine envelopes
2
3 along with the date.

4 Q Is that on each packet?

5 A It's I believe only on the top and the bottom
6 of each packet and the line scored on each side of the
7 envelopes.

8 Q What color is the line?

9 A It's a red marking pen.

10 Q I show you what's been marked as Government's
11 Exhibit 52C for identification. That's a white plastic
12 bag, is it not?

13 A Yes, it is.

14 Q Can you identify the plastic bag?

15 A Yes, I can. My initials appear on the outside
16 of the plastic bag along with the date of the incident.

17 Q Can you look at the contents of that plastic
18 bag and tell us what that is?

19 A These are the four stacks of glassine envelopes,
20 25 in each stack, that was found inside this white plastic
21 bag on the front floor of the white Cougar.

22 Q And how do you recognize it as that?

23 A My initials and the date appear on the top
24 and bottom envelope and these envelopes are scored with
25 black marking pen on the side.

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Pepe-direct

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Q When you found them were they wrapped with rubberbands as they are now?

A Yes, they were.

Q And does each packet or group of 25 bags appear to be in the same condition in which you found it?

A Yes, it does.

Q Sergeant Pepe, how long did you spend with the narcotics unit in the Newark Police Department?

A A little over six years.

Q And during that time approximately how many investigations did you work on involving narcotic drugs?

A I would say well in the thousands. Maybe about two or three thousand.

Q And in the course of your work did you come into contact with various implements which are used in the preparation of narcotic drugs?

A Yes, I did.

Q And did that include cocaine as well as heroin?

A Yes, ma'am.

Q I'm showing you what has been marked as Government's Exhibit 58D in evidence. Can you tell us what that is?

A That is measuring spoons.

Q And are these measuring spoons similar to

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Pepe-direct

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spoons which you encounter in your investigations?

A Yes, ma'am.

Q What size are the spoons?

A Looks like one is a teaspoon and I believe the other one is a tablespoon.

Q And I show you what has also been marked as Government's Exhibit 38--I in evidence. What are those?

MR. FIGUEROA: Your Honor, may I ask for a side bar at this time concerning the exhibits which are about to--

THE COURT: All right, surely.

(At the side bar)

MR. FIGUEROA: Your Honor, we had a hearing on the contraband consisting of 175 bags. We had pre-trial hearing several months ago. Ms. Cushman for the government now qualifies Mr. Pepe as an expert, evidently, or wishes to qualify him and seeks to introduce further evidence of which I've had no notice whatever, and I object to its introduction at this time, and I think it's prejudicial.

MR. BELLER: These are in evidence. These are taken from Mitchell's home, and he's going to discuss the difference between coke spoon that's used for snorting. He's finished with his testimony about Davis.

MS. CUSHMAN: I'll ask him if he's ever seen them before today.

MS. CUSHMAN: I'll inquire of the witness.

MR. FIGUEROA: I would ask at this time, your Honor, in order to avoid any irreparable harm to my defendant that the government show what they intend to do at this time by virtue of these spoons. I have no knowledge of it, and this is an opportune time to go into this.

MS. CUSHMAN: Well, looking at the exhibits, it's

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Pepe-direct

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clear that --

MR. BELLER: Is that what you want?

THE COURT: No. I take it she's just going to show that the larger spoons, that in the trade if we can call it that are used for cutting and the little tiny fellow here in this one exhibit is the one that's used for sniffing.

MS. CUSHMAN: That's correct.

THE COURT: That's the snow shovel as Mr. Richman put it on one occasion.

MR. MITCHELL: That was my question.

MR. FIGUEROA: Your Honor, for the record now I object to joining testimony of this agent to the fact that it was elicited that he found \$2,300 cash on his person at the time of his arrest. Juxtaposed with the evidence that was recovered from him at this time your Honor, I think overwhelmingly prejudicial because it infers that this man was a big dealer at the time and again I had no notice that at this time they were going to mention the \$2,300 cash.

I also object, your Honor, to the fact of their bringing out that there was a warrant for this man's arrest which indicates to the jury again that he had committed a prior crime or that there had been prior activity by him which led or necessitated his arrest which may have

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Pepe-direct

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not been connected with the matter that was recovered from him.

THE COURT: All right. I deny the various applications.

MR. FIGUEROA: Would your Honor instruct the jury that they are to divorce any consideration about Davis concerning these two exhibits?

THE COURT: Yes, I'll do that. Now these are exhibits that were admitted yesterday and have nothing to do with this particular seizure at all. Is that what you wish me to state?

MR. FIGUEROA: Yes, your Honor.

THE COURT: And he's going to testify to these as an expert witness having nothing to do with this seizure.

MR. FIGUEROA: Thank you, your Honor.

(In open court)

THE COURT: Ladies and gentlemen, I've been asked to instruct you, and I deem it appropriate to do so, that these various spoons are ones that went into evidence yesterday. These spoons have nothing to do whatsoever with the testimony this witness has given about seizure from Mr. Davis' car, have nothing to do with it at all. He's being asked to testify as to these in the capacity as an

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Pepe-direct

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expert witness, so keep this matter straight in your mind in that regard.

MS. CUSHMAN: May the record reflect that I'm cutting open what has been marked as Government's Exhibit 38-I in evidence and removing from that plastic bag the contents which further contained any small plastic bag. May I have this marked as Government's Exhibit 38-I also in evidence.

MR. BELLER: What I would suggest, your Honor. is that we simply switch the tags because it was the larger bag that was marked in evidence and it's actually the contents that are in evidence if that's permissible.

THE COURT: Any objection to that? Very good.

MR. OFFER: I'm going to ask for a side bar.
Is that the evidence that was submitted against my client?
Is that it?

THE COURT: All right, come up.

(At the side bar)

THE COURT: This is your note, correct?

MR. RUBINSTEIN: That's correct, Judge.

THE COURT: Mr. Offer, before we get to what you want to raise I was asked yesterday for a limiting instruction on the Detective Johnson-Martin New Jersey registration proof.

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Pepe-direct

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2 MS. CUSHMAN: Government has no further questions
3 of this witness.

4 MR. FIGUEROA: May I have a very brief side bar
5 before I commence cross-examination?

6 (At the side bar)

7 MR. FIGUEROA: The court has under entirely
8 different circumstances I suppose warned various defense
9 counsel against bringing out matters of arrests of various
10 witnesses before clearing it with the court.

11 At this time, your Honor, I wish to state my
12 objection to the matter of my client's arrest having come
13 in because an arrest of itself is no indication of guilt
14 and furthermore it is not probative that Tommy Davis
15 was engaged in the narcotic trafficking at the time unless
16 they're able to show that he at that time was in fact
17 convicted. And the rest is of no probative value whatsoever
18 and I would like the court to instruct the jury as to that
19 before I commence any cross-examination because if the
20 court does not instruct the jury I will have to ask certain
21 questions along that line. I think an arrest by itself
22 is indicative of nothing.

23 MS. CUSHMAN: Mr. Figueroa, you're disputing
24 that the man was convicted of this crime?

25 MR. FIGUEROA: I just say based on what the

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Pepe-direct

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government has submitted it is unfair and prejudicial.
They should take a stand, was he guilty of actually
trafficking in drugs or was he not?

The mere fact that he was arrested means nothing
and it should mean nothing to the jury your Honor.

MS. CUCHMAN: Well, in fact he was convicted.

MR. BELLER: We have to explain why we bring out
the fact.

MR. FIGUEROA: You don't have to explain why.
The net effect on the jury is what I'm worried about. I
understand you have various motivations which you cannot
appreciate.

THE COURT: You know what this is it seems to me
a little bit different. The police officer is saying
that there was an occasion when there was an arrest and
on that occasion, and that justifies the searching of the car
there was found in his car a quantity of heroin.

I don't think the situations are comparable at all
This is not going to attack anybody's credibility. This is
establishing a circumstance under which heroin is found in
the car.

MR. FIGUEROA: But he was arrested for the
heroin, your Honor, and I say again, I mean that of itself
is not probative. An arrest is not probative. I merely

1 say the government should take a position on it.

2 THE COURT: What do you want me to tell the jury?

3 MR. FIGUEROA: I would want you to tell the jury
4 that the mere fact that Tommy Davis was arrested in and
5 of itself is not probative without any further indication
6 that he was in fact dealing in narcotics as brought out
7 by a subsequent conviction.

8 THE COURT: I'm not going to do that because
9 the stuff was found in the car. The jury can find that
10 fact against him.

11 MR. FIGUEROA: Yes, but they're being asked
12 as triers of the fact to judge his guilt for that particular
13 transaction in Newark.

14 THE COURT: I don't think so.

15 MR. FIGUEROA: That's a trial within a trial.

16 THE COURT: No, they're being asked to determine
17 whether he's in fact a member of this conspiracy because
18 there was heroin in his car which Jack Brown says was his
19 heroin.

20 MR. FIGUEROA: And that necessarily involves
21 whether he was guilty of possession of narcotics in Newark
22 on November, 1972.

23 MR. BELLER: If you want to bring it out that
24 he was convicted I am not going to object.
25

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Pepe-cross

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MR. FIGUEROA: Your Honor, could the government bring it out?

THE COURT: I am not going to instruct the government to bring it out, no.

(In open court)

MR. FIGUEROA: May I proceed, your Honor?

THE COURT: Please do.

CROSS EXAMINATION

BY MR. FIGUEROA:

Q Sergeant Pepe, the fact to which you've testified occurred in 1972, is that correct?

A 1970.

Q 1970. You weren't a sergeant at that time, were you?

A No, I was not.

Q You were a private or --

A Detective.

Q You're an expert as far as narcotics are concerned, are you not?

A Yes, I am.

Q I mean you've been involved in how many arrests?

A In the thousands.

Q In the thousands?

A Yes.

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Pepe-cross*

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Q Now I show you 52B. I believe there was 52C.

3

Did you yourself recover 52C?

4

A Is this 52C? This one here?

5

Q I take it it is.

6

A Yes, the four --

7

Q Please just answer my question yes or no.

8

Did you recover the 52C?

9

A Yes, I did.

10

Q And 52B did you recover that also?

11

A No, sir, it was recovered by Detective Abruzzo.

12

Q When did you initial 52B?

13

A That night at the narcotic office.

14

Q Was that in your possession prior to that time?

15

Did you in fact take it to the narcotics office?

16

A I believe I did, yes, sir.

17

Q What do you mean you believe you did. Do you

18

have any records concerning this?

19

A No, sir, I don't.

20

Q And you've had thousands of cases involving

21

arrests for similar type crimes, is that correct?

22

A Yes, sir.

23

Q And are you telling this jury at this time

24

that you were able to recall this particular instance

25

that you took that particular narcotics to the lab? Is

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Pepe-cross

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that what you're telling the jury?

A No, sir, I didn't. You said take it down to the office. I did not take it to the lab.

Q Do you recall whether you took it to the office?

A I believe I did take it to the office.

Q You believe. Do you have any notes with you that you took it to the office?

MR. BELLER: Objection, your Honor. Asked and answered.

THE COURT: Yes, sustained. Go ahead.

Q This occurrence took place over six years ago, is that correct?

A Yes, sir.

Q And at that time you had like hundreds and hundreds of these arrests, is that correct?

A Yes, sir.

Q And are you now testifying from memory that you remember distinctly having taken these, that contraband to the office?

A Yes, sir.

Q If I asked you what your immediately prior arrest to this one for narcotics was could you remember that?

A No, sir.

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Pepe-cross

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Q If I asked you what the very next narcotics arrest that you were engaged in after this seizure could you remember that?

A No, sir.

Q Could you remember for instance if you took those narcotics to the lab?

A The next arrest?

Q Yes.

A I would have to refresh my memory as to the arrest and I'd probably be able to tell you, yes, sir.

Q Now the bags that you have in your hands signified as 52C, they're not very big bags, are they?

MR. BELLER: Objection.

MR. FIGUEROA: Well, I'm asking him as an expert, Mr. Beller.

MR. BELLER: Objection, your Honor.

A This is 52B.

Q That's 52B what you recovered yourself?

A No, sir, it was not.

T6 am

hps

Pepe - cross

5622

1 Q Let me give you 52-C. Look at 52-C and tell
2 us if any of your arrests have involved seizures typified
3 by one of the banks in 52-C?
4

5 A It's hard to answer that question. These
6 bags were known at that time as New York Eights. In other
7 words \$8 bags. At that time we were getting what is
8 known as the \$3 bags or three for \$10 bags which were
9 apparently much smaller. You would get more of those
10 than these at that time.

11 Q If somebody represented to you that those were
12 \$7 bags, would you be able to distinguish the difference
13 between a \$2 bag and an \$8bag?

14 A Yes, I would.

15 Q Would a \$2 bag be smaller than those bags?

16 A Really the size of the bag does not determine
17 the price. What's inside the bag. You can have a big
18 bag and only have enough narcotics inside the bag to have
19 a \$2 bag.

20 Q Tell us what is inside the bag, without looking
21 at it. What quantity of substance is inside the bag?

22 MR. BELLER: Your Honor, I object. He may
23 be good, but not that good.

24 MR. FIGUEROA: He said they are \$8 bags and
25 it necessarily implies he knows the quantity.

1 hps

Pepe - cross

2 Q What quantity is inside those bags?

3 MR. BELLER: I object to the question if he
4 can't look at the bag.

5 THE COURT: I will sustain the objection.

6 How much is in an \$8 bag?

7 THE WITNESS: At that time the equivalent to
8 approximately two and a half the amount in the \$3 bag.
9 As far as weight goes?

10 THE COURT: Yes, sir.

11 THE WITNESS: I would say approximately about a
12 half a gram to a gram.

13 Q How much substance ordinarily comes in a \$3
14 bag at that time?

15 A At that time it was anywhere between five-
16 tenths of a gram.

17 Q What is in Exhibit 52 before you?

18 A Approximately a gram, maybe a little over a
19 gram in that bag.

2 20 Q Are you able to tell these exhibits contain a
21 gram by looking at them or have you referred to something
22 else?

23 A I would have to open it up and look at the bag
24 itself.

25 Q Isn't it correct that you don't really know how

hps

Pepe - cross

5624

much is in those bags?

A As they are now?

Q Yes.

A Not until you open it.

Q Do you still say they are \$8 bags?

A Yes, I do, because I opened one at the time of the arrest.

Q That was back in 1970, wasn't it?

A That's correct.

Q That was six years ago?

A That would be six years next month.

Q That was during the time you were making these hundreds of arrests?

A Yes, sir.

Q Is it your testimony that you remember having opened up one of those bags and determining at that time that that was an \$8 bag?

A Yes, sir.

Q And you remember this without the aid of notes, sir?

A Yes, sir.

Q Are you up for promotion?

A No, sir.

Q Let me ask you this, Sergeant Pepe:

hps

Pepe - cross

5625

These bags that you have before you are what they call street bags, are they not?

A Yes, sir.

Q If you weighed all those bags, the substance as far as contraband itself, exclusive of any diluteness would be less than half an ounce, would it not?

A You mean the actual heroin itself?

Q The actual contraband itself.

A Well, it's all according to how much cut stuff is in there. I'm not a chemist. But, if you weigh the total amount including the cut items --

Q I refer to just the contraband.

A I don't know how much narcotics is in there.

Q So your estimation of how much these bags cost is arrived at without knowing the exact amount of narcotics in those bags, is that correct?

A And also the price at that time, yes, sir.

Q Did you process Mr. Davis yourself?

A I was one of the officers. The actual arrest sheet, I don't know who made it.

Q When you say he was processed, what do you mean by processed?

A The necessary papers, what we call the arrest sheets were typed out, the record checked through the

hps

Pepe - cross

5626

Record Bureau and then he was brought over to be finger-printed and his picture taken and he was placed in the cell block.

Q Did you carry the case, did you stick with the case at that time of his arrest?

A The next time I was involved in this case was at the motion to suppress in County Court, in Essex County.

Q Did there come a time, Sergeant Pepe, when Mr. Davis went to jail?

A Yes, sir, I believe so.

Q Did you testify in the grand jury as to this case?

A No, sir.

Q Tell us, if you know, whether Mr. Davis went to jail for two years from 1974 to this past February 1976, for this crime that you are testifying to?

A No, sir, I do not know.

Q Do you know whether he was convicted for that crime?

A He pleaded guilty to the crime.

Q He was convicted, is that right?

A Yes, sir.

Q And he was sentenced, is that right?

1 hps

Pepe - cross

2 A I believe I was told he was sentenced to five
3 years.

4 Q And that was back when?

5 A I don't recall the exact date. It was '72
6 or '73.

7 Q And do you know when he was released?

8 A No, I don't.

9 Q Would it refresh your recollection if I told
10 you it was February of this past year?

11 A No, sir. I remember seeing Mr. Davis --

12 Q I just asked if it refreshed your recollection,
13 Sergeant Pepe.

14 MR. BELLER: Objection, your Honor.

15 THE COURT: Does it refresh your recollection?

16 THE WITNESS: No, it doesn't.

17 THE COURT: Any other cross-examination?

18 MR. RICHMAN: May I ask this witness as an expert
19 one question?

20 THE COURT: You may.

21 MR. COHN: I have a motion, your Honor. May I
22 reserve until the recess, which has to do with this
23 testimony?

24 THE COURT: Yes.
25 -

1
2 It has also been stipulated by and between the
3 United States of America by its attorneys and Thomas Davis,
4 the defendant, by his attorney Nicholas Figueroa that
5 Annie Lenear, the woman who was called as a witness yesterday
b3 6 if she testified would testify as follows: That she is
7 a police chemist with the Newark Police Department and
8 that on November 5, 1970, she obtained the contents of
9 what has been marked as Government Exhibit 52 for identi-
10 fication; which were Government's Exhibits 52B for
11 identification and Government's Exhibit 52C for identifica-
12 tion;

13 That after receiving these seven packages or
14 bundles of decks, she analyzed the contents of one of the
15 little glassine envelopes from each group and found the
16 contents of one randomly taken from each group to consist
17 of, out of the group which had a red stripe down the side,
18 one pack contained .3631 grams of 11.6 percent heroin,
19 and one of the envelopes in this package which has a black
20 marked on the side contained .3726 grams of 10.4 percent
21 heroin;

22 That after she analyzed the contents of one
23 of the envelopes out of the first group and one of the
24 envelopes out of the second group, she placed them back
25 in the container in which she had received them, an

1 hph

2 envelope, and she had placed her laboratory number and
3 initials on the different packages;

4 She sealed the evidence envelope, with a red
5 seal and placed it in the vault of the police chemist
6 laboratory and it remained in their custody until it was
7 brought to the United States Attorney's office this month.

8 At this time, your Honor, the government offers
9 Exhibits 52B and 52C in evidence, which are all together
10 the seven packages of decks of heroin and the plastic
11 bag in which they came.

12 MR. FIGUEROA: Your Honor, although I agree
13 to the stipulation, I object to the introduction of the
14 physical evidence itself as being unnecessary and pre-
15 judicial to my client's defense.

16 THE COURT: Objection is overruled.

17 MR. GOTKIN: That all goes against Mr. Figueroa's
18 client?

19 MS. CUSHMAN: No.

20 THE COURT: Come to the side bar, please.

21 (At the side bar)

22 THE COURT: I want to make sure Ms. Cushman
23 gives you the first page of the stipulation she was
24 reading. You came in about halfway down, reading on the
25 page.

hph6

80a

1
2 read by you to see if the proof applies to some of them,
3 all of them or none of them as you may determine.

4 Now, in this connection I would like to point
5 out that certain evidence was received as to other
6 occasions which are not charged in the indictment when,
7 for example, certain defendants allegedly had drug
8 dealings with Jack Brown prior to the beginning of the
9 alleged conspiracy or as well as the testimony of Mrs.
10 Tompkins and Mrs. Ladd as to drug dealings which are
11 not charged.

12 When I deal with defendants individually, I
13 will be more specific as to these matters which are
14 what we lawyers call prior similar acts. However, I
15 caution you this evidence, if credited by you is to be
16 considered only on the question of whether a defendant
17 became a member of the conspiracy charged in this indictment,
18 it is only background, and only to the extent that it bears,
19 if you so find, on the question of the defendant's con-
20 nection with this particular conspiracy.

21 None of the defendants are on trial for any charge
22 other than those contained in this indictment, as I
23 have said to you before. I charge you, however, also that
24 any evidence of a prior similar act may not be considered
25 by you in any manner in your determination of defendants'

1 hph7

2 guilt on a substantive count, which I shall come to,
3 and you may not consider evidence of such alleged activity
4 by a defendant against any other defendant in this case.

5 So, to sum up: In order to prove the crime
6 alleged in the first count, conspiracy, the government
7 must establish the following four elements beyond a reason-
8 able doubt: First, the existence of the conspiracy alleged
9 for a substantial part of the period alleged.

10 Second. That it was part of the conspiracy to
11 unlawfully violate the narcotics statutes to which I re-
12 ferred.

13 Third. That the defendant under consideration
14 by you knowingly and wilfully became a participant in
15 the conspiracy.

16 And, fourth, that at least one of the co-
17 conspirators knowingly committed at least one alleged overt
18 act in furtherance of the conspiracy during its existence.

19 Let me read those four elements to you again,
20 since they are the summation of what has been quite a
21 bit of charge to you.

22 The government must establish the following
23 four elements beyond a reasonable doubt:

24 First. The existence of the conspiracy alleged,
25 for a substantial part of the period.

d3

hph

1
2 Police Department testifying to the effect that on
3 November 2, 1970, he arrested Davis and at that time there
4 were three stacks of glassine envelopes, each containing
5 a white powder, in the floor of his car was a white plastic
6 bag containing more stacks of glassine envelopes, and
7 a test revealed it was positive, and at the time of his
8 arrest he had \$2,300 in his pocket.

9 There was a stipulation in evidence that a woman
10 named Annie Lenear, a police chemist in Newark, in the Newark
11 Police Department, if she would have been called would
12 testify she had examined the contents of a series of
13 exhibits, GX52 put in evidence by Sergeant Pepe, and
14 these little glassine envelopes she found one randomly
15 taken from each group to consist of heroin.

16 Mr. Davis, on the other hand, contends that
17 the evidence against him rests almost entirely on the
18 testimony of Jack Brown and that Brown's testimony is
19 unworthy of belief. In this regard he points to various
20 inconsistencies in Brown's direct testimony, cross-
21 examination, Grand Jury testimony and various statements
d4 22 given to government agents.

23 Davis further contends that the 175 street bags
24 of heroin he possessed in 1970 was not heroin, which
25 he received from Brown as Brown has testified. Whether

hph

1 you credit Brown's testimony that this was his heroin
2 and consider this possession of heroin as an act in furtherance
3 of the conspiracy or you do not, it being only background
4 in your determination as to whether Davis was in fact
5 a member of the conspiracy as charged, I charge you that
6 you may not consider this arrest or possession in connection
7 with any determination of Mr. Davis' guilt on the substantive
8 Counts 22 or 23. You may only consider it, as I have out-
9 lined to you, with regard to the conspiracy count.
10

11 Now, a young man, Mr. Ronny Davis testified
12 here and said he was 19 years old and was the son of
13 Tommy Davis, worked five days a week and goes to school
14 five days a week; he has known Dawn Moten since 1969, they
15 were schoolmates, she is the daughter of Frank Moten and
16 he knew her in June of 1972. He gave the telephone number
17 923 1732 and said there were calls between himself and
18 Dawn during that time.

19 Count 24 charges in or about November of 1971
20 in this district, defendant James Laws also known as
21 Tobe, possessed with intent to distribute approximately
22 1 kilogram of cocaine. The government's contention is in
23 November of 1971, Laws came to Brown's apartment and wanted
24 to purchase cocaine, that he got the money for the cocaine
25 from Brown but did not take it from him. His girl

1 hph

2 whatsoever. I take exception to the fact that the govern-
3 ment contended that Tommy Davis was present in the 66th
4 Street residence of Jack Brown when there is no evidence
5 whatsoever as far as I am concerned that he was ever there;
6 intentions as far as Tommy Davis are concerned involved
7 the 180 West End Avenue address only and I would like
8 the court to correct that.

9 There was also another error which was to the
10 effect that the defendant Tommy Davis denies that the
11 heroin with which he was arrested in 1970 came from Brown.
12 That is completely in error. It has been, as a matter
13 of fact, the strategy of Tommy Davis to not even to reach
14 this issue. Now the court has brought up the issue
15 whether it did or not, from Tommy Davis and I think in
16 a very unfair light as far as the defendant is concerned.
17 I would ask the court, inasmuch as it has been brought out,
18 your Honor, I would ask the court to charge the jury
19 if they find the evidence insufficient to connect that
20 heroin with Jack Brown, that they are to disregard the
21 arrest of Tommy Davis for the 175 bags completely as
22 having no probative value.

23 THE COURT: It would have probably a value on
24 being a member of the conspiracy.

25 MR. FIGUEROA: Only in the instance as to some

1 hph

2 phase of state of mind, only to that limited extent. We
3 get into a completely different charge on that count.

4 MR. FIGUEROA: Your Honor, I also do not recollect
5 the court's charging inasmuch as the jury's consideration
6 of that arrest as far as a similar act. I do recall that
7 the court did say that they are not to consider it in
8 reference to the substantive counts, but I do not recall
9 the court informing the jury for what reason they were
10 to consider it.

11 THE COURT: I did that as well, that it should
12 be considered on the conspiracy count.

13 MR. FIGUEROA: To what extent?

14 THE COURT: I have forgotten, but I am prepared
15 to stand by it.

16 MR. FIGUEROA: I don't recall your Honor has
17 specifically brought out to what extent and under what
18 conditions they are to consider it and I regret not having
19 a copy of the minutes at this time. I did submit a request
20 on similar acts, your Honor, several weeks ago.

21 THE COURT: I do see I omitted a statement
22 he was in jail. When was this period?

d14 23 MR. FIGUEROA: February 14, 1974, to February 17,
24 1976.

25 THE COURT: That's stipulated, right?

1
2 MR. FIGUEROA: Yes, your Honor, and I would
3 ask the jury be instructed they are to consider that during
4 that time, they are to consider his arrest or his inactivity
5 during that time relative to his involvement in the
6 conspiracy.

7 THE COURT: Mr. Beller.

8 MR. BELLER: I have never understood the
9 relevance of that particular piece of information but
10 the government's contention is with respect to that, that
11 there is no testimony that he had any involvement beyond
12 1972.

13 MR. FIGUEROA: Another thing, your Honor, as
14 far as my request--

15 THE COURT: May I say that to the jury?

16 MR. BELLER: The government contends that he
17 was dealing with Brown between 1967 and 1972.

18 THE COURT: 1972. I will charge the government
19 does not make any contention Mr. Davis was involved beyond
20 '72. Is that agreeable?

21 MR. FIGUEROA: Yes, your Honor.

22 THE COURT: He in fact was in jail from
23 February, '74, to '76. What about the 66th Street apartment?
24 Does it make any difference that it is somewhere else?

25 MR. FIGUEROA: It does, your Honor. That sort

1 of extends to Tommy Davis' involvement in this matter
2 to the time when Brown was living at the 66th Street address.

3 THE COURT: Going forward without addressing
4 myself to that at this point, particularly given what the
5 government is willing to have me state with regard to the
6 participation.
7

8 MR. FIGUEROA: I submitted in the request as
9 to similar acts or other crimes, some time ago. I under-
10 stand, your Honor, that has been denied, is that correct?

11 THE COURT: I gave a similar acts charge. I
12 trust it contains, in essence, what we have discussed.

13 MR. FIGUEROA: Your Honor did not give my--

14 THE COURT: I didn't give it in your form.

15 MR. FIGUEROA: Just for the record, my form
16 stressed the fact that they were to consider his prior
17 arrest only as it affected state of mind as far as motivation
18 or intention to join the conspiracy and your Honor has not
19 really touched on that. I expect to your Honor's charge.

20 THE COURT: You say there is no dispute as to
21 his subject of heroin. Didn't Brown testify it was his
22 heroin? Brown testified it was his heroin.

23 MR. FIGUEROA: We never denied that it was,
24 your Honor.

25 THE COURT: That leaves you in a very strange

1 hph

2 posture. If you don't deny it was, then the jury can
3 conclude that in '70 he was a member of the conspiracy
4 pending--

5 MR. FIGUEROA: It's one thing to deny something
6 inferentially, your Honor, and another to point out in
7 an active way that we deny it on the court's marshaling
8 of the evidence.

9 THE COURT: You want the jury to conclude it
10 was not Brown's heroin.

11 MR. FIGUEROA: Your Honor, it has been brought
12 out. My request at this time is that they find insufficient
13 evidence that it was Brown's heroin, then they are to
14 disregard the arrest of Tommy Davis in 1970 as far as
15 the conspiracy count is concerned.

16 THE COURT: I would think you would have a
17 conspiracy count even if it wasn't.

18 MR. FIGUEROA: If they find that it was not
19 Jack Brown's heroin, they are only to consider it as far
20 as Tommy Davis' state of mind in joining the conspiracy.

21 THE COURT: That they would do under the charge
22 I in fact gave.

23 MR. BELLER: Your Honor, I have some questions
24 with respect to the use of the evidence on the substantive
25 count. I can do it later or now.

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

- against -

JUAN ANTONIO ALVAREZ, Zet al
Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Victor Ortega, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1715 Lacombe Avenue; Bronx, New York

That on the 13th day of April, 1977 at 1 St. Andrews Plaza
New York, N.Y.

deponent served the annexed

Appendix & ~~Brief~~

Robert Fiske Jr.
U.S. Attorney

upon

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 13th
day of April, 1977

Victor Ortega
Victor Ortega

ROBERT T. BRIN
Notary Public, State of New York
No. 010418950
Qualified in New York County
March 30, 1977

